92-1380

Supreme Court, U.S.
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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

WALTER M. WOLAK, JR.,

Petitioner

vs.

UNITED STATES OF AMERICA,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

Petitioner Walter M. Wolak, Jr. was convicted on a charge of felon in possession of firearm, under the sentencing enhancement provision known as the Armed Career Criminal Act (ACCA), 18 U.S.C. §924(e). Under 18 U.S.C. §921(a)(20), prior convictions for which the defendant "has had civil rights restored" do not count as convictions under the firearms chapter. Petitioner claims that his prior Michigan convictions meet the criteria of 18 U.S.C. §921(a)(20), and that therefore he cannot properly be sentenced under the ACCA.

QUESTION 1: When does a state court conviction qualify as a conviction for which the defendant "has had civil rights restored" under 18 U.S.C. §921(a)(20)?

QUESTION 2: Does Michigan statutory law restore the civil rights of convicted felons after 8 years?

QUESTION 3: Are the provisions of a Michigan court rule sufficient to deprive Michigan convicted felons of their civil rights, even though Michigan statutes grant felons the civil rights that the court rule purports to take away, and even though Michigan law provides that court rules are unenforcible when they conflict with legislation on substantive issues?

QUESTION 4: Does the "rule of lenity" apply to judicial interpretation of 18 U.S.C. §921(a)(20)?

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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

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vs.

UNITED STATES OF AMERICA,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Walter Wolak, Petitioner, by and through his attorney, James S. Lawrence, moves this Court to issue a Writ of Certiorari to review a judgment of the United States Court of Appeals for the Sixth Circuit, issued November 18, 1992.

OPINIONS BELOW

The opinion of the Sixth Circuit Court of Appeals of November 18, 1992 is attached as Appendix A. The opinion of the U.S. District Court of March 17, 1992 is attached as Apendix B.

STATEMENT OF JURISDICTION

This case began as a Motion to Vacate, Correct or Set Aside a sentence in a criminal case in U.S. District Court, with jurisdiction under 18 U.S.C. § 2255. The final judgment of the U.S. Court of Appeals for the Sixth Circuit affirming the District Court was entered November 18, 1992. This Court has jurisdiction to entertain a Petition for Writ of Certiorari pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

18 U.S.C. §921(a)(20) states:

"Any conviction which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored shall not be considered a conviction for purposes of this chapter unless such pardon, expungment, or restoration of civil rights expressly provides that the person may not ship, transport, possess or receive firearms."

18 U.S.C. § 922(g)(1) states:

"It shall be unlawful for any person--(1) who has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year ... to ship or transport in interstate or

foreign commerce, or possess in or affecting commerce, and firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce."

18 U.S.C. § 924(a)(1)(B) provides:

"...[W]hoever...knowingly violates subsection (a)(4), (a)(6), (f), (g), (i), (j), or (k) of section 922 ... shall be fined not more than $5,000, imprisoned not more than five years, or both[.]"

18 U.S.C. § 924(e)(1) provides:

"In the case of a person who violated section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, such person shall be fined not more than $25,000 and imprisoned not less than fifteen years[.]"

M.C.L. 28.422 (Michigan Compiled Laws) states:

"A person shall not purchase, carry, or transport a pistol without first having obtained a license therefore as prescribed in this section...A license shall not be issued to any person unless the appliction meets all of the following: ... Has not been convicted of a felony or has not been incarcerated as a result of a felony conviction in this state or elsewhere during the 8-year period immediately preceding the date of application."

M.C.L. 600.1307a(1)(e) states:

"to qualify as a juror a person shall ... not be under sentence for a felony at the time of jury selection."

COURT RULES INVOLVED

M.C.R. 2.511(D)(2) (Michigan Court Rules) states:

"The parties may challenge jurors for cause and the court shall rule on each challenge...It is grounds for a challenge for cause that the person: ... has been convicted of a felony."

STATE CONSTITUTIONAL PROVISIONS INVOLVED

Mich. Const. 1963, Art IV, §1 states:

"The legislative power of the State of Michigan is vested in a senate and house of representatives."

Mich. Const. 1963, Art VI, §5 states:

"The supreme court shall be general rules establish, modify, amend and simplify the practice and procedure in all courts of this state."

STATEMENT OF THE CASE

Petitioner Wlater M. Wolak, Jr. was convicted of felon in possession of a firearm pursuant to 18 U.S.C. §922(g). He was sentenced as an Armed Career Criminal pursuant to 18 U.S.C. §924(e). He originally received a sentence of 20 years on November 8, 1989. An appeal was taken, reported as *United States v. Wolak*, 923 F.2d 1193 (6th Cir. 1991). Subsequently, on September 4, 1991, he was resentenced to 188 months (15 years, 8 months). Case No. 89-80323.

On December 18, 1991, Petitioner filed a Motion to Vacate, Set Aside and/or Correct Sentence under 28 U.S.C. §2255. This was given Case No. 91-76936. It was claimed that Petitioner should not have been sentenced as an Armed Career Criminal, because of the provisions of 18 U.S.C. §921 (a)(20). A haring was held March 5, 1992. On March 19, 1992, Judge Bernard A. Friedman issued a written order denying the motion. On November 18, 1992, the Sixth Circuit affirmed. (Case No. 92-1496).

The facts are reported in *United States v. Wolak*, 923 F.2d 1193 (6th Cir. 1991). In brief, it was found that Petitioner Wolak was a convicted felon, and that he possessed a pistol on May 5, 1989.

Prior to May 5, 1989, Petitioner had a variety of criminal convictions. Two of these were for federal crimes, a 1976 and a 1981 conviction for conspiracy to destribute a controlled substance. Petitioner was released from the 1981 conviction in 1988.

Petitioner's other criminal offenses were all Michigan offenses. The last Michigan conviction for a crime of violence or drugs was his conviction in 1973 for attempted felonious assault. He was released from custody in 1975.

REASONS FOR GRANTING THE WRIT

QUESTION 1: When does a state court conviction qualify as a conviction for which the defendant "has had civil rights restored" under 18 U.S.C. §921(a)(20)?

QUESTION 2: Does Michigan statutory law restore the civil rights of convicted felons after 8 years?

QUESTION 3: Are the provisions of a Michigan court rule sufficient to deprive Michigan convicted felons of their civil rights, even though Michigan statutes grant felons the civil rights that the court rule purports to take away, and even though Michigan law provides that court rules are unenforcible when they conflict with legislation on substantive issues?

QUESTION 4: Does the "rule of lenity" apply to judicial interpretation of 18 U.S.C. §921(a)(20)?

The federal firearms statutes are a centerpiece of federal criminal law on a nationwide level. Their importance in crime control, and by virtue of sheer numbers, cannot be denied. Many, many prosecutions are carried out under these laws.

Many of the defendants being prosecuted are persons with prior state felony convictions, convicted of felon in possession of a firearm. Under the Armed Career Criminal Act (ACCA), 18 U.S.C. §924(e), persons with 3 prior felonies for drugs or violence earn greatly enhanced penalties for possessing a firearm.

Confusion comes about by virtue of 18 U.S.C. §921(a)(20), which provides:

> "Any conviction which has been expunged, or set aside or for which a person has been pardoned or has

had civil rights restored **shall not be considered a conviction for purposes of this chapter** unless such pardon, expungment, or restoration of civil rights expressly provides that the person may not ship, transport, possess or receive firearms."

The provision that some genuine convictions shall not be considered convictions for purposes of the firearms chapter will make some persons, otherwise sentenceable under the ACCA, exempt from ACCA sentencing. The question of who these people are, and which convictions "shall not be considered convictions," is obviously of major significance to the jurisprudence of the United States.

There are over 50 state and territorial jurisdictions, each of which has different laws concerning the extent to which the civil rights of ex-felons are restored. This creates a difficult problem for federal courts, yet, the power of Congress to enact 18 U.S.C. §921(a)(20) and to cause this problem for federal courts cannot be questioned. Clearly, the federal courts of the United States would benefit from a single standard by which each conviction in each state or territory can be looked at to determine whether they do or do not qualify under the exclusion proviso of 18 U.S.C. §921(a)(20).

The claim of Petitioner Wolak was based on Michigan law, which provides that a convict is not entitled to vote or hold public office while incarcerated, but can do so when the confinement is ended. *In the Matter of Callanan*, 419 Mich. 376 (1984); 1977-78 Opinion, Mich. Atty. Gen., No. 5295; 1955-56 Opinion, Mich.Atty. Gen., No. 2393.

The claim is also based on the Michigan statute which provides that the right to possess firearms is restored after 8 years after release from the conviction. M.C.L. 28.422. It was well over

8 years since Mr. Wolak's last release from a state conviction at the time of the instant offense in 1989.

The claim is also based on the Michigan statute which provides that a person may serve on a jury, provided he is not presently under a felony sentence at the time of jury selection. M.C.L. 600.1307(a)(1).

If Wolak's Michigan convictions are convictions for which his civil rights have been restored, then Mr. Wolak's prior record is 2 federal drug charges, and his sentence of 15 years, 8 months under the ACCA was improper. This case presents a direct legal controversy as to how long Mr. Wolak's sentence can properly be.

Mr. Wolak's claim is directly supported by published cases, including *United States v. Dahms*, 938 F.2d 131 (9th Cir. 1991) and *United States v. Gilliam*, 778 F. Supp. 935 (E.D. Mich. 1991), and indirectly supported by *United States v. Cassidy*, 899 F.2d 543 (6th Cir. 1990); *United States v. Edwards*, 946 F.2d 1347 (8th Cir. 1991) and *United States v. McBryde*, 938 F.2d 533 (4th Cir. 1991). Yet, the Sixth Circuit denied his claim on the basis of *United States v. Driscoll*, 970 F.2d 1472 (6th Cir. 1992).

United States v. Driscoll and *United States v. Dahms* both deal with the same subject: prior Michigan convictions. They reach diametrically opposite conclusions. It is not a good idea for one law to apply in the Sixth Circuit, and a different law to apply in the 4th, 8th and 9th Circuits. U.S. Supreme Court involvement appears necessary.

The Court in *Driscoll* cited two reasons for holding that Michigan does not restore civil rights to convicted felons. The first is that although Michigan statutes allow ex-felons to sit on juries, M.C.L. 600.1307a(1)(e), a Michigan Court Rule, M.C.R. 2.511(D)(2) permits

them to be excused for cause. The *Driscoll* Court held that Michigan does not restore the civil right of an ex-felon to sit on a jury.

The fact that court rules allowed summoned venirepersons to be excused for cause or on peremptory challenge illustrates one central fact: that no person, after being summoned for jury service, has a "right" to be on the jury. The excused juror has no enforcible right not to be excused. The persons excused are not considered to have been denied any civil right.

No published case has heretofore held that a challenge for cause to a jury venireperson constitutes a deprivation of the juror's civil rights. That such a challenge is not a violation of civil rights is manifest. For example, it may be a denial of a litigant's rights when opposing counsel uses his challenges to strike persons of one racial group from the jury. *Batson v. Kentucky*, 476 U.S. 79; 106 S.Ct. 1712; 90 L.Ed.2d 69 (1986). However, there is no case holding that the stricken venireperson has been deprived of a civil right. If this court agrees with the Court in *Driscoll*, then every person struck from a jury would have the right to sue in federal court under 42 U.S.C. 1983 for deprivation of a civil right. This would constitute a very great expansion of civil rights liability.

Either the Michigan Court Rule deprives ex-felons of civil rights, or it does not. No other option is possible.

If it does deprive ex-felons of civil rights, then the Court Rule is unenforcible under Michigan law.

"The legislative power is the authority to make, alter, amend and repeal laws." *Harsha v. City of Detroit*, 261 Mich. 586, 590 (1933). Under the Michigan Constitution, that power is commited exclusively to the legislature. Mich. Const. 1963, Art IV, §1.

The Michigan Supreme Court's rule-making authority, Mich. Const. 1963, Art VI, §5, is supreme to legislative acts **only** as to

matters of practice and procedure. Under Michigan law, when the MichiganSupreme Court issues a rule depriving people of **substantive** rights, such a rule cannot supersede the legislative act, and is invalid. The Michigan Supreme Court expressly so held in *Smith v. Smith*, 433 Mich. 606, 619-620 (1989), striking down its own court rule that conflicted with a substantive provision of law:

> "We acknowledge that this conclusion is contrary to MCR 3.209(B)(1)(b), originally adopted by this Court in 1972 as GCR 1963, 729.2(1). However, this Court has said that court rules may take precedence over statutory language only in matter involving judicial rules of practice and procedure. See *Perin v. Peuler*, 373 Mich 531; 130 NW2d 4 (1964). The child support provision of §17a is a matter of *substantive* law and, as such, supersedes MCR 3.209(B)(1)(b)...
>
> **Insofar as this court rule may interfere with any legislative act governing substantive law, the court rule is without legal effect."**[23]

[23] ... **"Nothing could be clearer than the fact that courts in the exercise of the rule-making power have no competence to promulgate rules governing substantive law."** [bold emphasis supplied]

Therefore, the Sixth Circuit's position in *Driscoll* and this case is inherently self-contradictory. If the Michigan Court Rule deals only with procedure, then it is not a rule depriving anyone, including Mr. Wolak, of any civil right. If the rule does deprive Mr. Wolak of a substantive civil right, then the rule is subservient to the act of the legislature, and would therefore be invalid as a matter of state law under *Smith v. Smith*. Therefore, the *Driscoll* ruling cannot be sustained whether the rule is held to deal with substantive or only with procedural matters.

The second ruling in *Driscoll* is that the 8 year delay before an ex-felon may possess a pistol, M.C.L. 28.422, means that civil rights

are not restored to ex-felons. However, the only reasonable interpretation of the Michigan statute is that the civil rights of ex-felons to possess pistols are denied for a period of 8 years, and then restored. A prior conviction more than 8 years old does not preclude possession of a pistol under Michigan law, and therefore such a conviction is not a "conviction" under 18 U.S.C. §921(a)(20).

The *Driscoll* ruling that an 8 year deprivation of civil rights constitutes a civil rights deprivation, even after the 8 years is up, is manifestly incorrect, and goal oriented. The *Driscoll* Court manifestly believes that the provisions of 18 U.S.C. §921(a)(20) are bad public policy, and therefore is willing to stretch interpretation beyond all reason in order to subvert this statutory provision. Petitioner appeals to this Court, especially Justice Scalia, to reject the idea that the wisdom of 18 U.S.C. §921(a)(20) has any bearing whatever on its interpretation.

Finally, the *Driscoll* Court considers and rejects the idea that the rule of lenity, *Rewis v. United States*, 401 U.S. 808; 91 S.Ct. 1056; 28 L.Ed.2d 493 (1971), should be applied to interpreting 18 U.S.C. §921(a)(20), because there is no ambiguity. However, the mere fact that numerous Courts have ruled directly contrary to *Driscoll* suggests that the matter is not free from ambiguity, and that therefore the rule of lenity should apply.

Conclusion

WHEREFORE, this Court should grant Certiorari, find that Petitioner is not subject to being sentenced under 18 U.S.C. §924(e), and order that Petitioner be resentenced to a term of not more than 10 years under 18 U.S.C. §924(a)(1).

Respectfully submitted

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No. 92-1496

United States Court of Appeals

For the Sixth Circuit

WALTER WOLAK,

Petitioner-Appellant

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

BEFORE: JONES and RYAN, Circuit Judges, and PECK, Senior Circuit Judge.

This case has been referred to a panel of the court pursuant to Rule 9(a), Rules of the Sixth Circuit. Upon examination, this panel unanimously agrees that oral argument is not needed. Fed R. App. P. 34(a).

Walter Wolak was convciited of being a felon in possession of a firearm in violation of 18 U.S.C. § 922 (g)(1). His sentence was subsequently enhanced to 20 years pursuant to the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e)(1). The conviction was affirmed on appeal. *United States v. Wolak*, 923 F.2d 1193 (6th Cir.) *cert. denied*, 111 S. Ct. 2824 (1991).

Wolak then filed a motion to vacate sentence under 28 U.S.C. §2255 in which he contended that certain of his prior felony convictions did not qualify as predicate offenses under the ACCA because his civil rights as to these convictions had been fully restored. The district court denied this motion and this appeal

followed. The parties have briefed the issues and have waived oral argument.

Upon consideration, we find the appeal to be meritless. In *United States v. Driscoll*, No. 91-1583, 1992 WL 165328 (6th Cir. July 16, 1992), a panel of this Court held that a felon no longer in custody had no right to sit on a jury under Michigan law. Wolak's previous convictions therefore qualify under the ACCA regardless of the merits of his other arguments.

Accordingly, the district court's judgment is affirmed. Rule 9(b)(3), Rules of the Sixth Circuit.

ENTERED BY ORDER OF THE COURT

LEONARD GREEN
Clerk

United States District Court
Eastern District of Michigan
Southern Division

WALTER WOLAK,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

Civil Action No.
91-CV-76936-DT
HON. BERNARD A.
FRIEDMAN

/

ORDER DENYING DEFENDANT'S MOTION TO VACATE, SET ASIDE OR CORRECT SENTENCE

This matter is before the court on defendant's motion to vacate, set aside or correct sentence, pursuant to 18 U.S.C. § 2255, filed December 18, 1991. The Court has reviewed the parties written submissions and heard oral argument.

I. BACKGROUND

Petitioner was convicted of unlawful possession of a firearm as a convicted felon, in violation of 18 U.S.C. § 922(g)(1), and was found to be an armed career criminal under 18 U.S.C. § 924(e) for having three or more prior convictions for serious drug offenses or violent felonies. Under § 921(a)(20), past convictions cannot be counted as felonies where civil rights have been restored. Petitioner does not challenge his conviction under § 922(g)(1) (felon in possession), but seeks to vacate, set aside or correct his sentence,

pursuant to 28 U.S.C. § 2255, arguing that some of his prior convictions cannot be considered for sentencing purposes under § 924(e) (Armed Career Criminal Act) because Michigan law restored his civil rights with respect to those convictions. Instead, petitioner argues that he should be sentenced under § 924(a)(2). [1]

II. DISCUSSION

Petitioner's motion is made pursuant to 28 U.S.C. § 2255. That section provides that a prisoner may challenge his sentence if it "was in excess of the maximum authorized by law." A motion to vacate, set aside or correct a sentence may be made at any time.

The Armed Career Criminal Act ("ACCA"), which carries a minimum fifteen-year sentence, applies if a defendant has "three previous convictions by any court . . . for a violent felony or a serious drug offense, or both." 18 U.S.C. § 924 (e) (1). [2] Petitioner does not dispute that his 1973 and 1981 federal convictions for heroin

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[1] § 924(a)(2) provides: "Whoever knowingly violates subsection (d), (g),(h),(i),(j), or (o) of section 922 shall be fined as provided in this title, imprisoned not more than 10 years or both.

[2] That section reads in its entirety: "In a case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or serious drug offense, or both, committed on occasions different from one another, such person shall be fined not more than $25,000 and imprisoned not less than fifteen years, and, notwithstanding any other provison of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g), and such person shall not be eligible for parole with respect to the sentence imposed under this subsection.

distribution qualify as "serious drug offenses" under the ACCA. His argument is that none of his other convictions, all under Michigan law,[3] can be counted as a "violent felony" as defined by the ACCA. The ACCA defines "violent felonies" as crimes "punishable by imprisonment for a term exceeding one year..." that fall into certain categories. § 924(e)(2)(B). A crime "punishable by imprisonment for a term exceeding one year" is defined in 18 U.S.C. § 921(a)(20), which provides:

> What constitutes a conviction of such a crime shall be determined in accordance with the law of the jurisdiction in which the proceedings were held. Any conviction which has been expunged, or set aside or for which a person has been pardoned or had his civil rights restored shall not be considered a conviction for purposes of this chapter, unless such pardon, expungement or restorationof civil rights expressly provides that the person may not ship, transport, possess, or receive firearms.

Petitioner argues that when he committed the firearm offense for which he received the ACCA enhancement, his civil rights had been restored under Michigan law without any limitation on his firearm privilege. Thus, he argues, none of his state convictions qualifies as a "violent felony" under the ACCA, and he cannot be sentenced as an armed career criminal.

In determining whether a seemingly violent felony is excluded by § 921(a)(20), courts "must look to the whole of state

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[3] These convictions are: 1) breaking and entering in 1954; 2) assault and battery in 1955; 3) disorderly person and creating a disturbance in 1955; 4) assault with intent to rob in 1955; 5) attempted breaking and entering in 1961; 6) attempted larceny in 1967; 7) grand larceny and attempted felonious assault in 1972; 8) receiving and concealing stolen property in 1979.

law in the state where the defendant was convicted in order to determine whether a conviction falls within the statutory definition. United States v. Breckinridge, 899 F.2d 540, 542 (6th Cir.), cert. denied, 111 S.Ct 119 (1990). A convicted felon has his civil rights restored when he is again "entitled to vote, hold public office, and serve on a jury." United States v. Cassidy, 899 F.2d 543, 549 (6th Cir. 1990). In addition, § 921(a)(20) provides protection only to felons whose civil rights have been restored if they are "entitled to exercise the privileges of shipping, transporting, possessing or receiving a firearm." Id. at 549.

A. Restoration of Civil Rights

Michigan law does not include any general restoration right. In United States v. Dahms, 938 F.2d 131 (9th Cir. 1991), in which the Ninth Circuit held that Michigan felons' rights are automatically restored upon completion of incarceration, the court "looked to the whole of Michigan law." First, under Michigan law, a convict is not entitled to vote while incarcerated, but regains that right upon release. M.C.L. § 168.758b. That section states:

> A person who, in a court of this or another state or in federal court, has been legally convicted and sentenced for a crime for which the penalty imposed is confinement in jail or prison shall not vote, offer to vote, attempt to vote, or be permitted to vote at any election while confined.

(Emphasis added.) The statute itself provides that a felon's right to vote is restored when confinement ends.

Second, a convicted felon has the right to hold public office in Michigan. Michigan statutory law provides:

> If any candidate for any public office at any election in this state shall be convicted of a felony, as defined in this act, the election of such candidate, if he has been elected, shall be void; and if he shall enter into the office for which he was elected, an information in the nature of a quo warranto to oust him from such office may be filed in the supreme court or the proper circuit court.

M.C.L. § 168.938. This provision does not bar a convicted felon, who has served his sentence and is released from incarceration, from holding public office in Michigan. It states only that a person convicted of a felony at the time of his candidacy or during his term in office may have his election voided or may be ousted from office. It does not bar a person from seeking or holding office because of a prior conviction. In the Matter of Callanan, 419 Mich. 376 (1984).

Third, Michigan law denies the right to sit on a jury only to persons under sentence for a felony. M.C.L. 600.1307(a). That section provides:

> (1) To qualify as a juror a person shall . . .
> (e) Not be under sentence for a felony at the time of jury selection.

Thus, a felon who is no longer under sentence may serve on a jury.

Based on these three rights, the Dahms court found that Michigan law fully restores a felon's civil rights:

> (S)everal sections of the Michigan Code suspend a convicted felon's right to vote; to hold public office; and to serve on a jury. Once incarceration has ended, however, these rights are restored automatically by the force of the very laws that suspend them. That these rights are found in separate sections of the Michigan Code as opposed to a single statute does not change their effect. We find that Dahms' rights were substantially restored.

Id. at 133. United States v. Gilliam, No. 91-80587, slip op. (E.D. Mich. November 21, 1991) (Gadola, J.), follows Dahms, holding that a Michigan conviction on which the sentence has expired cannot be considered a conviction under federal firearms laws because of Michigan's policy of restoring civil rights.

The government argues that the Dahms court did not examine "the whole of Michigan law" because it failed to consider Michigan Court Rule 2.511(D)(2), which subjects felons to challenge for cause. If either party makes a motion to challenge a juror for cause, the court "must excuse the juror from the panel." M.C.R. juror from the panel." M.C.R. § 6.412(d)(2); People v. Lamar, 153 Mich. App. 127, 134-35 (1986) (The Michigan Court Rules "require a court to excuse a joror whenever a challenge for cause clearly falls within one of the enumerated grounds"). Because petitioner could be challenged for cause from jury service, the government argues that his civil rights have not been restored. As a result, it asserts that his convictions should not be excluded under § 921(a)(20). This argument is the basis for the decision in United States v. Butler, No. 91-80729-01, slip op. (E.D. Mich. 1992) (Woods, J.), denying defendant's motion to dismiss the indictment.

The court is not persuaded by this argument, however, because the right to sit on a jury is different from challenge for cause. A challenge for cause presumes the right to sit on a jury. Gilliam, slip op. at 5. To accept the government's argument that felons have no right to sit on a jury because they can be challenged for cause would mean that all other types of persons who can be challenged ffor cause also have no right to serve on a jury. The Michigan Court Rules state that the following persons, among others, may be challenged for cause: persons subpoenaed as a witness in the action, persons

who have already sat on a trial of the same issue, persons who are the guardian, conservator, ward, landlord, tenant, employer, employee, partner, or client of a party or attorney. M.C.R. 2.511(D). However, we do not doubt the right to jury service of these people. The basis for the categories for which people can be excused for cause is that the persons in those categories are presumed to be biased. Brownell v. Brown, 114 Mich. App. 760, 786 (1982). Convicted felons, once released, may be presumed biased against the criminal justice system, but they are not denied the right to serve on juries. Therefore, Wolak's right to sit on a jury was restored.

Another case has held that a defendant's civil rights are not restored in Michigan because the language of § 921(a)(20) indicates that Congress intended that restoration occur only when a written document, such as a certificate, or some other affirmative act restores rights. United States v. Hammonds, No. 91-80130, slip op., (E.D. Mich. February 28, 1992) (Rosen, J.). If no affirmative act is taken to restore civil rights, then they are not restored. However, the Sixth Circuit has held that courts should look to the "whole of state law" to determine whether civil rights have been restored. Breckinridge, 899 F.2d at 542. In Michigan, each of the statutes that takes away a convicted felon's civil rights does so only for the period of incarceration. By the language of the statutes themselves, those rights are restored upon release. The court must consider these statutes as part of the whole of state law. The statutes do not require any affirmative act of restoration, and therefore, none is needed to restore these civil rights.

B. Restriction of Firearms Privileges

Even where a felon's civil rights are restored, however, his prior felony convictions can be counted under the ACCA if his firearms privileges have not been restored. Under § 921(a)(20), a conviction will not be exempted if the restoration "expressly provides that the person may not ship, transport, possess or receive firearms." The Sixth Circuit has held that it rejects "the requirement that the express restriction on firearms privileges must be contained in the same statutory provision, or in the certificate, which restores civil rights." Cassidy, 899 F.2d at 545, n. 5.

At the time petitioner drew his revolver on May 5, 1989, Michigan law included the following firearm restriction:

> A person shall not purchase, carry, or transport a pistol without first having obtained a license therefor as prescribed in this section . . . . A license shall not be granted under this section to any person unless the applicant meets all of the following:
>
> • • •
>
> (c) Has not been convicted of a felony or has not been incarcerated as a result of a felony conviction in this state or elsewhere during the 8-year period immediately preceding the date of application.

M.C.L. § 28.422.[4] The government argues that because petitioner was released from prison for a federal conviction on July 20, 1988, his right to possess a firearm was restricted at the time of his May 5, 1989, felon-in-possession offense. Therefore, his state conviction

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[4] This statute was amended, effective March 28, 1991, to require that: "(t)he person has not been convicted of a crime punishable by imprisonment for more than 1 year. This subdivision does not apply to a conviction that has been expunged or set aside, or for which the person has been pardoned or has had his or her civil rights restored unless the expungement, order, or pardon expressly provides that the person shall not ship, transport, possess, or receive firearms. M.C.L. § 28.422(3)(c) (West Supp. 1991).

could be counted as predicate conviction, and sentence enhancement under ACCA was proper.

In United States v. Burns, 934 F.2d 1157 (10th Cir. 1991), cert. denied, . ____ S.Ct. ____ (1992), a Kansas statute[5] prohibited persons from possessing a pistol within five years after release from imprisonment for a felony. The petitioner challenged a sentence enhanced under ACCA, pursuant to § 2255, arguing that his 1965 burglary conviction could not be used as a predicate conviction because his civil rights had been restored as to this conviction. However, even though more than five years had passed since his state conviction, the court rejected Burns' argument because his firearms privileges had never been fully restored. Id. at 1160-61. Intervening federal convictions and prison terms had kept the five-year limitations period from ever expiring.

Likewise, in our case, petitioner's intervening convictions have prevented the eight-year period from lapsing. The presentence report shows that Wolak has never gone eight straight years without a felony conviction or imprisonment since 1973. In 1973, he was sentenced to 1 1/2 to 5 years for his conviction for grand larceny and attempted felonious assault. Between the time of that crime and that sentence, he also committed a federal drug

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5 The Kansas statute is virtually identical to the Michigan statute with the exception of the time period:

(1) Unlawful possession of a firearm is:

* * *

(b) possession of a firearm with a barrel less than 12 inches long by a person who, within five years preceding such violation has been convicted of a felony under the laws of Kansas or any other jurisdiction or has been released from imprisonment for a felony; . . .

offense. He was sentenced for that crime later in 1973. He was paroled from his state prison term in 1975, and from his federal term in 1977. He was convicted of receiving and conceling stolen property over $100 in 1979, and sentenced in 1980 for this crime to 2 to 5 years in prison.[6] In 1982, he was sentenced for another federal drug offense, and paroled in 1988. He committed the crime for which he is currently sentenced on May 5, 1989. Never since 1973 has petitioner gone at least eight years without being convicted of a felony or being incarcerated. Therefore, his firearms privileges with respect to the 1973 conviction have never been restored. As a result, this conviction meets the "unless" clause of § 921(a)(20), and can be counted as a predicate offense under ACCA.

In Gilliam, the court rejected a similar argument. That case is distinguishable, however, because more than eight years had expired since the petitioner's prior conviction, so his right to possess firearms had been restored. Gilliam, slip op. at 6-7. In addition, petitioner in that case was convicted of possessing a shotgun. Because the statute affects only his rights to possess a pistol, the court held that it did not apply. Id. at 10. Here petitioner possessed a Colt 45 revolver. Michigan law defines a pistol as "any firearm, loaded or unloaded, which by its construction and appearance conceals it as a firearm." M.C.L. § 28.421(a). Presumably, a Colt 45 revolver meets this definition. Because petitioner has not gone eight straight years without a felony conviction or incarceration as a result of a felony

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6 The presentence report says "parole dates unknown." But even if he served no time for this conviction, it still restarts the eight-year period because it is a felony conviction.

conviction since 1973, his firearms privileges with respect to that conviction have never been restored. Consequently, this conviction can be counted as a predicate offense under ACCA.

IV. CONCLUSION

Although petitioner's civil rights have been restored with respect to his state convictions, state law still restricts his right to ship, transport, possess or receive firearms, so that the "unless" clause of §921(a)(20) is met. Because petitioner has not gone more than eight years without a felony conviction or incarceration as a result of a felony conviction since 1973, his right to possess firearms has never been restored from that conviction. Therefore, the 1973 conviction for grand larceny and attempted felonious assault can be counted as a predicate crime for purposes of enhancing his sentence under ACCA. It was not improper for the court to sentence Wolak as an armed career criminal.

Accordingly,

IT IS ORDERED that petitioner's motion to vacate, set aside or correct sentence is denied.

BERNARD A. FRIEDMAN
UNITED STATES DISTRICT JUDGE

Dated: Mar 17, 1992
Detroit, Michigan